No. 10967

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM MORRIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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Jurisdictional Statement.

The United States District Court for the Southern District of California, Central Division, had jurisdiction of the cause under Section 205(b) of the Emergency Price Control Act of 1942, as amended, 56 Stat. 23 (50 U.S.C. App. 901 *et seq.*) and Section 24 of the Judicial Code (28 U.S.C. 41(2)). The offenses charged in the information were committed in the City of Los Angeles, State of California, within the jurisdiction of the District Court. This Court has jurisdiction of the appeal under Section 128 of the Judicial Code (28 U.S.C. 225).

Statutes and Regulations Involved.

Sections 202 and 205(b) of the Emergency Price Control Act of 1942, as amended, 56 Stat. 23 (50 U.S.C. App. 901 *et seq.*) provide in part:

Section 202 (50 U.S.C. App. 922):

"Investigations, records; reports

* * * * * * * *

"(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place." (202b)

Section 205(b) (50 U.S.C. App. 925):

"Enforcement

* * * * * * * *

"(b) Any person who willfully violates any provision of section 4 of this Act [section 904 of this Appendix], and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202 [sections 902 or 922 of this Appendix], shall, upon conviction thereof, be sub-

ject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4(c) [section 904(c) of this Appendix] and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administratrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought."

Maximum Price Regulation 292, as amended, Sections 1351.1405 and 1351.1414 (8 Fed. Reg. 135 and 543) provide in part:

"*Definition and maximum prices of intermediate sellers:* (a) For the purposes of this regulation, the term 'intermediate sellers' means any wholesale sellers, jobbers or any other persons who take title and purchase for the purpose of reselling and who customarily make sales to other wholesalers, retailers, or industrial, institutional or commercial users, except that the term 'intermediate sellers' shall not include packers, brokers, auction markets, terminal sellers or retailers as defined in this regulation. 'Intermediate sellers' shall include commission merchants who receive citrus fruits on consignment and sell in the same or similar manner as other wholesalers and such commission merchants shall come within the appropriate class of intermediate sellers set forth in this section according to the type of distributive service rendered."

* * * * * * * *

"(b) Intermediate sellers shall be divided into the following classes:

"(2) *Class 2: Cash-and-carry wholesalers.* A cash-and-carry wholesaler is a wholesaler not in Class 1 who distributes citrus fruits for resale or to

commercial, industrial or institutional users and who does not customarily deliver to purchasers."

* * * * * * * *

"(g) Every intermediate seller selling citrus fruits shall:

"(1) Make and preserve for examination by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, records of the same kind as he has customarily kept relating to the prices which he charges for each item of citrus fruits after the effective date of this regulation and, in addition, records showing as precisely as possible, the basis upon which he determined maximum prices for each item."

* * * * * * * *

"§1351.1414" Definitions. (a) When used in this regulation, the term:

* * * * * * * *

"(5) 'Records' includes books of account, sales lists, sales slips, orders, vouchers, contracts, receipts, invoices, bills of lading and other papers and documents."

Statement of the Case.

On November 1, 1944, Charles H. Carr, United States Attorney for the Southern District of California, filed an information in four counts in the United States District Court for the Southern District of California, Central Division, charging appellant with violations of the Emergency Price Control Act of 1942 (50 U.S.C. App. 902 *et seq.*), as amended [R. 13-18], herein called the Act.[1]

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[1]The symbol "R" refers to the printed record on appeal, the symbol "App. Br." refers to appellant's opening brief, and the symbol "Gov. Exh." to the Government's exhibits herein.

Counts 1 and 2 of the information each charge that appellant made a false entry in a document required to be kept under the provisions of the Act, respecting sales of oranges [R. 13-15]. Counts 3 and 4 each charge that appellant made a sale of oranges at a price in excess of the maximum permitted by the applicable maximum price regulations promulgated under the Act [R. 15-18].[2]

On November 9, 1944, appellant filed a demurrer and a notice of motion to quash and set aside this information [R. 19-21], which were overruled and denied, respectively, by the district court after hearing on November 27, 1944 [R. 25]. Appellant thereupon, on November 27 also, entered a plea of not guilty as to each count of the information [R. 25], and was tried before the district court and a jury on January 3 and 4, 1945 [R. 26-32].

On January 3, 1945, after the first witness had been sworn, appellant raised various objections to the sufficiency of the information [R. 56-60]. The district court thereupon granted the Government's motion to amend the information by the insertion of certain phraseology calculated to show that the Maximum Price Regulation 292,

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[2]On October 13, 1944, appellant had filed a demurrer to an information originally filed against appellant on October 5, 1943 [R. 2-7, 9], as well as a notice of motion to quash and set aside the information [R. 10-11]. Following a hearing on the motion before the district court on October 23, 1943 [R. 22], a new information, referred to in the text, was filed by the Government with permission of the court [R. 12-18], upon which, as subsequently amended [R. 28], the prosecution of appellant was predicated [R. 28-29].

as amended, had been approved by the Secretary of Agriculture[3] [R. 28-29].

After the Government had rested, the district court granted appellant's motion for a directed verdict as to counts 3 and 4 of the information, and denied the motion as to counts 1 and 2 [R. 30]. Thereafter appellant introduced evidence on his own behalf [R. 30-31], and later renewed his motion for a directed verdict [R. 94].

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[3]The information as finally amended at the trial reads as follows, with the amendment shown in italics:

"COUNT ONE.

"That on or about the 27th day of October, 1943, in the City of Los Angeles, County of Los Angeles, State of California, in the district aforesaid and in the central division thereof, and within the jurisdiction of this Court, the defendant William Morris violated the provisions of the Emergency Price Control Act of 1942 as amended, in that he did knowingly, wilfully and unlawfully make an entry false in a material respect, in Morris Bros. Fruit Co.'s copy of a statement showing the sale to Aldrich & Company, 14 South Water Market, Chicago Illinois, of five hundred and eighty-two (582) boxes of oranges for the price of Four Dollars and Fifty Cents ($4.50) per box, or a total sum of Two Thousand Six Hundred and Nineteen Dollars ($2619.00), whereas the actual price charged for the sale of said oranges at said time and place was an average of Five Dollars and Fifty Cents ($5.50) per box, or a total sum of Three Thousand Two Hundred and One Dollars ($3201.00), which fact as to the price charged for said sale of said oranges was known to the defendant at the time of said entry, and said entry was false at the time of making said record, and said record was a document required to be kept under the provisions of Section 1351.1405(g) of Maximum Price Regulation 292, as amended (8 Fed. Reg. 135 and 8 Fed. Reg. 543), which was promulgated pursuant to the provisions of Section 202 of the Emergency Price Control Act of 1942, *which Regulation 292, as amended had been approved by the Secretary of Agriculture* [LRY J] as amended; in violation of Section 205(b) of the Emergency Price Control Act, as amended, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942) [R. 13-14].

Each of the other three counts were similarly amended [R. 14-18].

The jury found appellant guilty under both counts 1 and 2 of the information [R. 32-33, 105]. Thereafter, following its denial of appellant's motion for a new trial [R. 33-35, 105-107], the district court sentenced appellant to imprisonment for six months on count 1 and to pay a fine of $2,500 on count 2 of the information [R. 37, 107].

Summary of Facts.[4]

On about October 15, 1943, one Arrigo, a partner in Aldrich & Company of Chicago, Illinois, which is engaged in supplying oranges and other items to hotels and other establishments, called at the Morris Brothers Fruit Company in Los Angeles, dealers in fruits [R. 64, 86], for the purpose of purchasing oranges [R. 69-70]. There Arrigo spoke to appellant [R. 70; see also R. 64], who is a partner in the latter concern, which is composed of appellant and his brothers Louis and Andrew Morris [R. 63, 64, 86, 87, 88].

Arrigo told appellant that he needed oranges "very badly," whereupon appellant offered to sell to Arrigo any quantity of oranges desired at $4.50 a case [R. 70]. Upon Arrigo's reply that the quoted price was "cheap" and that he wanted some oranges, appellant stated: "Wait a minute. You have got to give me $1.25 each case on the side" [R. 70]. Arrigo declined to pay the total price thus demanded by appellant and, "after an exchange of opin-

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[4]Appellant's "Short Statement of Facts" (App. Br. pp. 2-6) consists of but some of the evidentiary matter in the record, and fails to present to this Court that evidence upon which alone the sufficiency of the evidence is to be tested on appeal—the evidence most favorable to the Government. Of course, it is elementary that only the evidence most favorable to the Government is to be considered herein by this Court, and appellant's obvious attempt to obtain from this Court consideration and evaluation of other evidence, must necessarily fail. See, *e. g., Womble v. United States,* 146 F. (2d) 263 (CCA 9); *Hemphill v. United States,* 120 F. (2d) 115, 117 (CCA 9) cert. den. 314 U. S. 627.

ions," Arrigo departed without making a purchase [R. 70].

On October 27, 1943, Arrigo returned to the premises of the Morris Brothers Fruit Company where he again spoke to appellant [R. 70]. Arrigo stated in part that his firm needed oranges "at any price" [R. 70]. Appellant replied: "You are lucky anyway. By waiting a week You have saved 25¢. It is $1.00 even extra today." [R. 70]. Thereupon Arrigo purchased two carloads of oranges from appellant [R. 71, 72, 74, 67, 89], receiving from appellant two "statements" [R. 71, 73, Gov. Exh.[5] 2 and 3]reflecting this transaction [R. 72, 91-93]. These "statements," which had been prepared by an office employee under appellant's direction [R. 71, 87; see also R. 69], each showed that Morris Brothers Fruit Company on October 27, 1943, sold to Aldrich & Company, 582 boxes of oranges at $4.50 a box or a total of $2,619.00 for each of the two sales [Gov. Exh. 2-3]. Arrigo was given one of the duplicate copies of each of the "statements" thus prepared [R. 68, 69].

Arrigo, however, gave to appellant in payment of the purchase, six separate checks, totaling $6,402.00 [R. 71, 72, 73-74, 75, 91-93].

Testifying in his own defense, appellant admitted at the trial that he sold the oranges mentioned above to Arrigo, testified that the price asked by him and received was $4.50 a box, and denied that he received from Arrigo the full sum which Arrigo claimed to have paid him in the transaction [R. 86-87]. Appellant further testified that the two statements concerning the transaction were prepared by "the girl," that she computed the price, and that

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[5]The original exhibits are by stipulation of counsel and order of Judge Wilbur before this Court [R. 113-115].

he did not tell her "anything about what to put on the statements" [R. 87]. Appellant in part admitted on cross-examination, however, that during the period when he made these sales to Arrigo, he, appellant, "had complete charge of the place," the Morris Brothers Fruit Company, that he "had charge over the bookkeepers and clerks and gave them directions which they carried out," and that in some instances he "checked up on them to see that they were following my directions" [R. 88].

In addition, appellant's brother Andrew in part testified in defense that two of the checks totaling $1,164, which Arrigo had testified were in part payment of the oranges, were cashed for Arrigo by Andrew at the former's request [R. 88-90] out of personal funds, as to which Andrew further testified: "I had the money in my pocket" [R. 90].

In rebuttal, Arrigo denied Andrew's testimony [R. 73-74, 91], and testified that the sum of $1,164 represented twice 582 [R. 91, 92], the total number of boxes of oranges which Arrigo purchased from appellant, at $1 overcharge per box [R. 98].

Questions Presented.

1. Whether the information upon which appellant was tried states an offense.

2. Whether the district court erred in denying appellant's motion for a directed verdict as to counts 3 and 4, and whether the evidence is sufficient to support the verdict of guilty as to those counts.

3. Whether the court committed reversible error in its various rulings during the case.

4. Whether the court committed reversible error in giving certain instructions and refusing to give others to the jury.

Summary of Argument.

I.

The information as amended states an offense.

II.

The evidence was sufficient to warrant the district court's denial of appellant's motions for a directed verdict as to counts 1 and 2, and to support the verdict of guilty under each of these counts.

III.

No reversible error was committed by the district court in its various rulings in the case.

IV.

No reversible error was committed by the district court in giving certain instructions to the jury and refusing to give others requested by appellant.

I.

The Information as Amended States an Offense.

A.

Appellant asserts that the trial court permitted the amendment of the information at the outset of the trial "without the consent of the defendant" (App. Br. p. 18), without "formal opportunity to plead or to object thereto" (App. Br. p. 20), and without the consent of the person over whose verification as to the truth of the matters alleged therein the information was issued (App. Br. pp. 19-20). Appellant further asserts that the information could not be amended "without the consent of the person who verified the oath" (App. Br. p. 19) and that the information as amended is fatally defective under the rule of *Ex Parte Bain,* 121 U. S. 1. There is no merit to these contentions.

First, appellant misconceives the holding of *Ex Parte Bain.* That case deals with amendments to an indictment; it has nothing to do with amending an information. It

is established, of course, that an indictment cannot be amended (*Ex Parte Bain*). But it is likewise established that an information can be amended. (See, *e. g. Armstrong v. United States,* 16 F. (2d) 62 (CCA 9), cert. den. 273 U. S. 766; *Walker v. United States,* 7 Fed. (2d) 309 (CCA 9); *Muncy v. United States,* 289 Fed. 780 (CCA 4).)

And it is further settled law that an information need not be verified. (See, *e. g. Cyclopedia of Federal Procedure,* 2nd Ed. Vol. 9, Sec. 4107; *Walker v. United States,* 7 F. (2d) 309 (CCA 9-1925); *Abbot Bros. Co. v. United States,* 242 Fed. 751 (CCA 73; *Weeks v. United States,* 216 Fed. 292 (CCA 2); *Christian v. United States,* 8 F. (2d) 732 (CCA 5-1925)[6]; *Tynan v. United*

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[6]Thus, in the *Christian* case, *supra,* the Court in part stated:

"The only purpose served by an oath to an information is to furnish a basis and authority for the arrest of the defendants. Logically, the only advantage a defendant could take of an unverified information would be to secure his release from custody, because there was no proper warrant of arrest. Whether the defendant is properly in custody is a matter which does not affect the information. It was all-sufficient that defendant was present and submitted to trial on a valid information."

And, in the *Weeks* case, *supra,* the Court said:

"* * * the right secured to the indivdual by the fourth amendment, as we understand it, is not a right to have the information, by which he is accused of crime, verified by the oath of the prosecuting officer of the government or to have it supported by the affidavit of some third person. His right is to be protected against the issuance of a warrant for his arrest, except 'upon probable cause supported by oath or affirmation,' and naming the person against whom it is to issue. If the application for the warrant is made to the court upon the strength of the information, then the information should be verified or supported by an affidavit showing probable cause to believe that the party against whom it is issued has committed the crime with which he is charged. But, if no warrant has issued, no arrest been made, and the person has voluntarily appeared, pleaded to the information, been tried, convicted, and fined, we fail to discover wherein any right secured to him by the fourth amendment has been infringed."

See also: *Walker v. United States,* 7 F. (2d) 309 (CCA 9. 1925) and *Pittman v. United States,* 42 F. (2d) 793 (CCA 8, 1930).

States, 297 Fed. 177 (CCA 9), cert. den. 266 U. S. 604.)

Secondly, the record fails to support appellant's assertions that the amendments were allowed without his consent, without opportunity to object, and without the consent of the person who verified the oath (App. Br. pp. 18, 19, 20). There is nothing in the record to show that appellant did not consent to the amendments or that he had no opportunity to object to them [see R. 58-60]. In fact, the record clearly reveals that there was ample opportunity for appellant to object, but that he did not avail himself of that opportunity [see R. 58-60], and that, moreover, appellant expressly stipulated in effect that the proceedings had prior to the amendment were to be considered as had on the information as the amended [R. 59-60]. Had appellant not consented to the amendments, he plainly would not have entered into such a stipulation. At least appellant would have recorded this objection to the amendment, which he did not do. Appellant's present contentions, therefore, merit only summary rejection.

Likewise without record support is appellant's assertion (*supra*) that the information's verifier did not consent to the amendment. There is nothing to show that he did not consent. And since he was the O. P. A. investigator familiar with the facts of the case, it is specious to argue, as appellant does, that he did not consent to the addition of language indicating that the Secretary of Agriculture duly approved the regulation involved—a fact established by the Federal Register. Counsel for the Government having moved the amendment of the information, it is to be presumed, unless the contrary is shown—and it has not been shown in this case—that counsel acted with the consent of the persons he represented and that his actions were in all respects regular and in conformance with law.

Moreover, since the information was filed by the United States Attorney, Government counsel, as an Assistant United States Attorney, was acting as the former's direct representative with authority to amend the information.

B.

Appellant asserts (App. Br. p. 21) that it was essential that the Secretary of Agriculture approve the price regulation here involved prior to the commencement of this case. The original information herein was filed on October 5, 1944 [R. 7, 8]. The Secretary of Agriculture duly approved the regulation on or prior to December 31, 1942 (8 Fed. Reg. 135-138). Therefore appellant's assertion is palpably pointless.

C.

Appellant next asserts in effect (App. Br. 21-24) that the information "fails to set up" that the Secretary of Agriculture approved the regulation herein involved and that the information does not contain other allegations which appellant conceives to be essential. The short answer is that, contrary to appellant's assertion, the information as amended at the trial specifically states that "regulation 292 as amended had been approved by the Secretary of Agriculture" [R. 14, 15, 28]. And amendment of the information in this respect was within the trial court's discretion, and in this instance clearly proper and unobjected to by appellant either at the time of amendment [R. 58-60] or at present on this ground. Moreover, it was not necessary even to amend the information since it properly states an offense without the added matter.

D.

The balance of appellant's assertions (App. Br. pp. 21-22) as to matters which he conceives should be included in the information, are presented so feebly as to warrant no reply beyond the statement that such matters need not be pleaded.[7]

II.

The Evidence Was Sufficient to Warrant the District Court's Denial of Appellant's Motions for a Directed Verdict as to Counts 1 and 2, and to Support the Verdict of Guilty Under Each of These Counts.

Appellant asserts (App. Br. pp. 36 *ff.*) that the evidence is insufficient to support the verdict of guilty, and reargues in this connection most of the contentions already made by him elsewhere in his brief. There is no merit to appellant's contentions.

In discussing the sufficiency of the evidence, appellant in effect seeks a reappraisal and reweighing of the testimony before the jury. It need hardly be stated that appellant is not entitled to a reappraisal and reweighing of all the evidence in the record. And the evidence most favorable to the Government, which we have summarized above, fully and credibly demonstrates that appellant made or caused to be made false entries in records customarily kept in the regular course and conduct of his business. That was a violation of the applicable law.

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[7]Moreover, it should be noted that the validity of a regulation of the type here involved can be challenged only before the Emergency Court of Appeals. *Yakus v. United States*, 320 U. S. 730.

In view of the clear and ample evidence which we have detailed above, further discussion of it appears to be unnecessary.

Likewise, it would serve no useful purpose to reconsider here the various contentions made by appellant under the general heading of insufficiency of evidence but which he has already raised elsewhere in his brief, and which we have also answered elsewhere in this brief.[8]

III.

No Reversible Error Was Committed by the District Court in its Various Rulings in the Case.

A.

Appellant complains (App. Br. pp. 27-35) that the District Court erred in admitting in evidence the testimony of witness Ann Joseph respecting the bookkeeping practices of Morris Brothers Fruit Company. This complaint is plainly lacking in substance.

Witness Joseph was the head bookkeeper of Morris Brothers Fruit Company between June, 1943 and July, 1944 [R. 67]. She testified in effect that "statements" of the type which Arrigo had received from appellant [Gov. Exh. 2-3] are made out in duplicate whenever carload lots of oranges are shipped; that, in addition, bills of lading for such shipments are made out in triplicate; that the original bill of lading is sent to the railroad; that a copy of the bill of lading, with a copy of the "statement" is sent to the purchaser; and that "we kept" the third copy of the bill of lading "with a duplicate state-

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[8]There is no reason to raise before this Court, as appellant does (App. Br. pp. 25-27), any issue as to the receipt in evidence of Government Exhibit 1, since this exhibit pertains solely to counts 3 and 4, which the trial court dismissed upon appellant's motion [R. 84-85].

ment attached so that when it was paid we would mark that copy and put it back in the files so that we kept a permanent record of all these things" [R. 68].[9]

The testimony of the head bookkeeper as to the record-keeping practices of Morris Brothers Fruit Company, is clearly competent to show what was done in the usual course of business in this respect prior to the promulgation of the maximum price regulation involved in this case, as well as thereafter. Morris Brothers Fruit Company was required by the Act and its regulations to make truthful entries upon whatever books and records were customarily kept by that concern. No citation of authority is required for the proposition that what those records were, manifestly could be established by the testimony of the head bookkeeper in charge of such work and records, which is precisely the substance of Joseph's testimony.

But Joseph was not alone in testifying that the statements were prepared customarily in duplicate; for appellant's brother and partner, Louis Morris, who is "the manager in charge" of Morris Brothers Fruit Company [R. 87], also testified, referring to Government's Exhibit 2, one of the statements, that it is "one of the regular statement forms of Morris Brothers Fruit Company. It was the custom of the company to make these up in duplicate" [R. 65, 66].

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[9]It should be noted in this connection that appellant's restatement of this witness' testimony (App. Br. pp. 28-35) is inaccurate and misleading in the instances in which appellant seeks to persuade this Court that Joseph testified that one of the duplicate copies of the *statement* was sent to the railroad and the other to the purchaser, leaving none for the records of Morris Brothers Fruit Company (App. Br. pp. 28, 29, 36). That is not true, as is clearly shown by the record. Joseph testified that the original of the *bill of lading* was sent to the railroad, that copy with a "statement" attached went to the customer and that "we kept the other *with a duplicate statement attached* * * * [R. 68].

Moreover, there is no word of testimony in the record that it was *not* the custom of Morris Brothers Fruit Company to make and keep such records in the regular course and conduct of its business. It would have been a simple matter, in view of Joseph's affirmative testimony in this respect, for the appellant to have produced at least one of the "bookkeepers and clerks" [R. 88] to testify that no such records were kept, if that were the fact. No such testimony was offered; and neither appellant nor his brother-partner, appellant's sole defense witness, denied that such records were kept either customarily or in the specific instances involved in this case [R. 86-90].

And it should not be overlooked that appellant himself deliberately obstructed the Government's effort to establish the record-keeping practices of Morris Brothers Fruit Company and the presence in its files of the two statements, by removing the records from the custody of his copartners and employees [R. 63, 64, 65], and thereby making it impossible to have the records produced at the trial. Thus, prior to the trial herein, a subpoena *duces tecum* was issued requiring the production of the originals from the files of Morris Brothers Fruit Company. At the trial, Louis Morris, one of appellant's brothers and partners [R. 63], who is also the manager in charge of that concern [87], upon whom the subpoena had been served, testified that he was unable to produce the original records because appellant "has got them" [R. 63, 64, 65]. The records were not produced. These records are "*quasi*-public" records, whose availability for inspection and use by proper governmental authorities in legal and other proceedings, is fully established, and requires no citation of authorities. In view of appellant's deliberate concealment of legally usable records which would have

fully disclosed the very facts which he now disputes, he can hardly be heard to protest now against the use of secondary evidence in that respect. And, regardless of appellant's participation in the record-removal episodes, absent the original records for any cause, secondary evidence of the type present in this record was clearly admissible and entitled to weight.

Little need be said concerning the cases quoted and cited by appellant (App. Br. pp. 29-35, 41-45), except that they are beside the point. Obviously, the rules governing admissibility of "general custom and usage" and "habit" evidence in negligence (App. Br. pp. 29-30), land deeding (App. Br. p. 30), stock ownership (App. Br. pp. 30-31), gambling and intoxication (App. Br. pp. 31-33), and passenger receiving (App. Br. p. 33) cases, have nothing to do with the issues of the instant case. Here under the regulations (*supra*), appellant, as well as Morris Brothers Fruit Company, was required to abstain from making "any statement or entry false in any material respect" (*supra*), in its customarily kept records. Louis Morris testified that Government Exhibit 2 was "one of the regular statement forms of Morris Brothers Fruit Company," and that it has always been the custom of the company to make these up in duplicate [R. 65, 66]. The head bookkeeper of this concern also testified that it was the custom of that concern to make these "statements" in duplicate "for the shipment of cars,"[10] and that the exhibits in question "represent shipment of cars" [R. 68]; that one of the duplicates is fur-

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[10]Appellant and his partners "sell oranges in carload lots and truckload lots" [R. 89], for a gross income of about $1,000,000 a year [R. 86].

nished to the customer and the other is retained in the files of Morris Brothers Fruit Company "so that when it was paid we would mark the copy paid and put it back in the file so that we keep a permanent record * * *" [R. 68]. And there is no evidence that the "statements" in issue were not so customarily kept. Clearly the evidence in this case respecting the records does not fall within the holdings of cases relied on by appellant.

B.

Appellant complains (App. Br. pp. 35-37) as to the receipt in evidence of Government's Exhibits 2 and 3 on the ground that these exhibits came from Arrigo and not the records of Morris Brothers Fruit Company and further, that they fail to show that appellant falsified a document kept in that concern.

These exhibits are carbon copies—duplicate originals—of the statements prepared under the direction of appellant and show the price demended by appellant and paid by Arrigo (*supra*). Arrigo testified that the price he paid was in excess of that shown by appellant on these statements (*supra*). Consequently these statements in evidence conclusively establish the making by appellant of a false entry in this transaction, and were clearly admissible for this purpose.

Upon these facts, the exhibits were clearly admissible in evidence for the purpose of establishing the making by appellant of false entries. And in addition, these statements were admissible for the further purpose of establishing that the other duplicate original copies were retained in the files of Morris Brothers Fruit Company as part of their regular records, not only because of their being duplicate original copies, but also from the testimony of Morris and Joseph, which we have already discussed.

IV.

No Reversible Error Was Committed by the District Court in Giving Certain Instructions to the Jury and Refusing to Give Others Requested by Appellant.

A.

Appellant now seeks (App. Br. pp. 17-18) for the first time in this case, to raise before this Court the contention that the trial court did not properly charge the jury, and seeks to justify its raising of this point for the first time on appeal by asserting that it is the trial court's duty to give proper instructions (App. Br. pp. 17-18). Appellant's contentions in this respect are wholly meritless, since appellant had a duty to note proper exceptions and was reminded of this by the trial judge.

There is no justification for appellant's attempt to circumvent the explicit rules of Court pertaining to the preservation of a proper record for appeal. Appellant, having failed to take exception to the trial court's charge to the jury along the lines he now urges, and having failed to assign error or make any specification of error in the matter, should not now be permitted to obtain from this Court consideration of his after-thought complaint. True, a trial court should give the proper instructions to the jury. Likewise, a trial court should rule correctly upon every motion and objection before it. But to permit appellant to bring into the case at this time a matter of this type for the advanced reason that the trial court should have done the right thing in the first place, would be tantamount to eliminating all the rules of court pertaining

to exceptions, assignments of error, specifications of error, and the preservation of a proper record on appeal. The chaotic result upon this Court's rules and procedure by the acceptance of appellant's contentions in this respect hardly requires exposition.

Had appellant made timely objection in the lower court, the matter might have been corrected, if necessary, before the jury began consideration of the issues. Such objection appellant failed to raise in time, to permit possible correction by the trial court. Plainly appellant, having slept on his rights, should not be permitted at the present time to nullify the eminently just verdict of the jury.

B.

Appellant's contention (App. Br. p. 18) that "* * * neither the Court, counsel, nor jury, could know from the instructions given upon what charge the defendant was being tried," is palpably baseless. Of course, the information [R. 13-18] was before the jury at all times. In addition, the trial court instructed the jury that the offense charged was a violation of the Act [R. 96], and that only counts 1 and 2 were before the jury [R. 98]. The trial court then charged:

> "If you believe beyond a reasonable doubt that on or about October 27, 1943, defendant sold five hundred and eighty-two boxes of oranges to Aldrich & Company at a price of $5.50 per box, or for a total sum of $3,619.00, and that said transaction was on behalf of Morris Brothers Fruit Company, and that defendant wilfully and deliberately, and not as a result of innocent mistake entered upon said Morris Brothers Fruit Company's copy of a statement show-

ing such sale, an entry that the sale had been made at a price of $4.50 per box or a total sale price of $2,619.00, and that the statement was made in a record of the kind customarily kept by Morris Brothers Fruit Company, during the time prior to January 11, 1943 (effective date of Regulation) then you will find defendant guilty as charged in Count One of the Information, regardless of what you may believe the correct ceiling price of such oranges to have been at said time.

"On the other hand, if you entertain a reasonable doubt as to whether any one or more of the elements I have just recited to you have been proved, you must give the defendant the benefit thereof and acquit him" [R. 98-99].

* * * * * * * *

"The court instructs you that the regulation under which this case arose, Maximum Price Regulation 292, was promulgated by the Price Administrator on December 31, 1942, to become effective January 11, 1943, and was duly approved by the Secretary of Agriculture before its promulgation, and that all this was done pursuant to the authority granted by the Congress of the United States in the Emergency Price Control Act of 1942, as amended."

"The regulation was duly published in Volume 8 of Federal Register, pages 135-138, under date of January 5, 1943" [R. 99].

It is clear that while the trial court did not read to the jury the regulation which appellant was charged with having violated, the formula instructions quoted above which

the trial court gave were plainly sufficient and fully apprised the jury of the necessary elements which had to be present to constitute the violations alleged in the information. These instructions translated the language of the regulation into simple, understandable tests by which the jurors were to determine the questions of fact and apply the law and thereby provided the jury with all of the material which a reading of the regulation could have supplied. And *Corson v. United States,* 147 F. (2d) 542 (CCA 9, 1945), cited by appellant does not support his position, because the trial court in this case carefully and fully did precisely what the decision in the *Corson* case held should be done. Manifestly, no reversible error was committed here.

C.

Appellant argues (App. Br. pp. 45-49) that the trial court erred in refusing to give to the jury appellant's proposed instructions 3-6 inclusive. There is no merit to this argument.

These proposed instructions (App. Br. pp. 45-47) all pertained to the definition of an accomplice and to the proposition that Arrigo was an accomplice of appellant, and that, therefore, the jury should view his testimony with caution and distrust. Specifically also appellant wanted the jury charged that one who buys at a price above the ceiling price is an accomplice of the seller and equally guilty (App. Br. p. 46).

Appellant was not entitled to any "accomplice" instructions since counts three and four, under which Arrigo

might be said to be an accomplice had been dismissed at the close of the Government's case [R. 84-85] and counts one and two relate to false entries, as to which Arrigo plainly had no part. As stated by the trial court [R. 103]:

> ". . . with the elimination of the two counts, there is no accomplice question before the court because the regulation charges him with keeping books, and an accomplice must be guilty of the same offense, and the regulation does not require the buyer to keep any books.
>
> "Therefore, with counts three and four, the question became moot and I can't very well give an instruction on accomplices because on counts one and two, Mr. Arrigo was not an accomplice."

The trial court was manifestly correct.

As stated by this court in *Caminetti v. United States,* 229 F. 545 (affirmed, 242 U. S. 470):

> "The test by which to determine whether one is an accomplice is to ascertain whether he could be indicted for the offense of which the accused is being tried. 12 Cyc. 445."

Plainly in this case Arrigo was not subject to indictment for the offense for which appellant was convicted under counts 1 and 2.

Moreover, it has long been recognized that the making or withholding of a cautionary instruction with respect to the testimony of an accomplice, is a discretionary matter. Thus in *United States v. Becker,* 62 F. (2d) 1007 (C.C. A. 2d 1933), the court, discussing this subject, stated:

"The warning is never an absolute necessity. It is usually desirable to give it; in close cases it may turn the scale; but it is at most merely a part of the general conduct of the trial, over which the judge's powers are discretionary, like his control over cross-examination, or his comments on the evidence. If he thinks it unnecessary—at least when, as here, the guilt is plain—he may properly refuse to give it."

In *Wallace v. United States,* 243 F. 300 (C.C.A. 7th 1917), the court said:

"But, if it were conceded that all of them were accomplices, there is no absolute duty on the court to give to the jury the usual charge cautioning them to exercise circumspection with respect to the evidence of accomplices, so that failure to give it would of itself be reversible error."[11]

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[11]Also, in *United States v. Block,* 88 F. (2d) 618 (C. C. A. 2d, 1937), the court stated:

"The only other question raised on Block's appeal is the failure of the judge to tell the jury that they should look jealously at the testimony of Rubin, as an accomplice. It is common practice so to caution a jury, but it is not necessary even when as here the accused asks that it be done."

And, finally, in *Greenberg v. United States,* 297 F. 45 (C. C. A. 8th, 1924), it was held that:

"While it is the better practice in a criminal prosecution to give an instruction cautioning the jury against too much reliance on the testimony of an accomplice, the failure to give such an instruction is not reversible error, and there is no absolute rule of law preventing conviction on such testimony."

See, to like effect, *Bosselman v. United States,* 239 F. 82 (C. C. A. 2d, 1917), and *Hanks v. United States,* 97 F. (2d) 309 (C. C. A. 4th, 1938). And it is noteworthy in this respect that testimony of Arrigo was corroborated by documentary evidence, particularly Government Exhibits 2-9, inclusive.

Conclusion.

The evidence upon which the jury found appellant guilty plainly furnishes adequate support for that verdict. The trial court committed no reversible error in its rulings, or in its instructions or refusals to give instructions to the jury. Appellant has had a fair and full trial. There is no reason for setting aside the verdict and the lower court's judgment. The judgment should be affirmed.

Respectfully submitted,

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